

**STATE BOARD OF EQUALIZATION**

LEGAL DIVISION (MIC:82)
450 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 324-2641.
FAX (916) 323-3387

MEMBER
First District

BRAD SHERMAN
Second District, Los Angeles

ERNEST J. DRONENBURG, JR.
Third District, San Diego

MATTHEW K. FONG
Fourth District, Los Angeles

GRAY DAVIS
Controller, Sacramento

November 21, 1994

BURTON W. OLIVER
Executive Director

Mr. L--- W---, President
F---
XXXX --- --- Road
--- ---, CA XXXXX

Dear Mr. W---:

I am responding to your letter of August 24, 1994. You ask how tax applies to your business. You lease compact disks (CDs). You also charge customers to place information on CDs you lease and to access information on your computer system.

You charge persons an advertising fee to place information on CDs. You then charge a fee to those who wish to acquire the CDs. The recipient must return the CD after no more than 30 days and a new CD with updated information is then sent to the customer. For a fee, some customers call your 1-900 number to receive information from your computer system. The information is provided to the customers verbally by your employees or electronically by fax. You do not provide the information to your customers in tangible form, such as on paper.

California imposes a sales tax on a retailer's gross receipts from the retail sale of tangible personal property in California unless the sale is specifically exempted from taxation by statute. (Rev. & Tax. Code § 6051.) A retail sale is a sale for any purpose other than resale in the regular course of business. (Rev. & Tax. Code § 6007.) Retailers may collect sales tax reimbursement from the purchaser if the contract of sale provides for the reimbursement (usually under the heading "sales tax"). (Civ. Code § 1656.1.) When sales tax is not applicable to a sale of tangible personal property (e.g., a lease of tangible personal property or the sale of tangible personal property occurs outside of California), the use of the property in California purchased from a retailer for use in California is subject to use tax if the property was purchased from a retailer for use in California. (Rev. & Tax. Code §§ 6201, 6401.) Although the use tax is owed by the purchaser, a retailer engaged in business in California must collect the use tax from the purchaser and pay it to the Board of Equalization. (Rev. &

Tax. Code § 6203.) All sales are presumed to be taxable retail sales unless the person making the sale takes from the purchaser a timely and valid resale certificate in good faith. (Rev. & Tax. Code § 6091, Reg. 1668.)

1. Placing information on CDs

Only sales and use of tangible personal property are subject to tax. A "sale" is defined as a transfer of title or possession of tangible personal property for a consideration. (Rev. & Tax. Code § 6006.) Business Taxes Law Guide Annotation 540.0020 (10/8/62) states as follows:

"Advertising Space. The sale of advertising space on maps does not constitute a sale of tangible personal property and the tax does not apply."

The same analysis applies to your situation. If you sell advertising space on CDs and the purchasers of that advertising receive no tangible personal property whatsoever, you are not regarded as selling tangible personal property. No sales or use tax applies to such advertising charges.

2. Lease of CDs

When you provide CDs on a temporary basis as you describe, you are leasing tangible personal property (the CDs). The lease of tangible personal property is a continuing sale of the property unless the lessor leases the property in substantially the same form as acquired and California sales tax reimbursement or use tax was timely paid measured by the purchase price of the property. (Rev. & Tax. Code §§ 6006(g)(5), 6006.1; Reg. 1660(b).) The tax on a lease which is a continuing sale is a use tax owed by the lessee, which is measured by the rentals payable on the lease. The lessor is required to collect the tax from the lessee and pay it to the Board of Equalization. (Reg. 1660(c)(1).)

Our understanding is that you obtain blank CDs and prepare them for lease. Thus, you are not leasing them in substantially the same form as acquired (blank CDs). Therefore, except as discussed below, your lease of the CDs is a taxable continuing sale and you must collect use tax from the customer measured by the rentals payable from the lease and pay it to the Board of Equalization. Subdivision (b) of Revenue and Taxation Code section 6362.7 exempts periodicals sold by subscription and delivered by mail or common carrier as follows:

"There are exempted from the taxes imposed by this part, the gross receipts from the sale of, and the storage, use, or other consumption in this state, of tangible personal property which becomes an ingredient or a component part of any periodical regularly issued at average intervals not exceeding three months, and any such periodical, that is sold by subscription and delivered by mail or common carrier."

We have previously considered the question of whether a CD may qualify as a periodical, as explained in Business Taxes Law Guide Annotation 385.0100 (3/25/93):

"A publication embodied in a CD-ROM format may qualify as a periodical when the publication meets the requirements of the exemption. A CD-ROM publication, if updated annually, does not qualify. If quarterly updates are complete in themselves, containing all information and not just the latest update information, they also do not qualify."

Thus, it is possible that your CDs may qualify as periodicals and thus qualify for the section 6362.7 exemption if satisfying all the elements of the exemption. To qualify as a periodical for purposes of the exemption, the property must meet the following requirements set forth in subdivision (c) of section 6362.7:

"For purposes of this section, 'periodical' means any publication that appears at stated intervals at least four times per year, but not more than 60 times per year, each issue of which contains news or information of general interest to the public, or to some particular organization or group of persons. Each issue must bear a relationship to prior or subsequent issues with respect to continuity of literary character or similarity of subject matter, and there must be some connection between the different issues of the series in the nature of the articles appearing in them. Each issue must be sufficiently similar in style and format to make it evident that it is one of a series. The term does not include printed sales messages, shopping guides, or other publications of which the advertising portion, including product publicity, exceeds 90 percent of the printed area of the entire issue in more than one-half of the issues during any 12-month period."

In other words, for purposes of this exemption, "periodical" is any publication that appears at stated intervals at least four times per year but no more than 60 times per year, each issue of which must:

- (1) contain news or information of general interest to the public or to some particular organization or group of persons;
- (2) bear a relationship to prior or subsequent issues with respect to continuity of literary character or similarity of subject matter;
- (3) be connected to the other issues of the series in the nature of the articles appearing in them; and
- (4) be sufficiently similar in style and format to make it evident that it is one of a series.

You state the data are delivered monthly to your customers on CDs. Since you are issuing the CDs twelve times per year, it is at intervals of at least four times per year, but no more than sixty times per year, and this condition appears to be satisfied. With respect to paragraphs (1) through (4) above, you have not provided us with sufficient information to make a determination whether the media you lease are true "periodicals" within the meaning of subsection (c) of section 6237. If you wish a definite

response as to whether the CDs you lease qualify as periodicals within the meaning of section 6362.7, please provide us with three consecutive issues of the CDs.

Since you are reselling the CDs in continuing sales (leases), you may purchase the blank CDs extax by issuing your vendor a timely and complete resale certificate (Reg. 1668, a copy of which is enclosed.) You state that you have been acquiring the CDs on a retail basis and paying the sales tax at the time of the acquisition. If this is so and if you make no use of the CDs prior to incorporating information onto the CDs and leasing them, you may take a tax-paid purchases resold deduction as explained in Regulation 1701 (a copy of which is enclosed) against any taxable rentals payable from non exempt leases of the CDs.

3. 1-900 Telephone Service Charges

As discussed above, sales tax applies only to retail sales of tangible personal property. From the information you provide, the usage of the 1-900 telephone number does not involve the transfer of any tangible personal property from you to the callers. We do not regard access by telephone for voice or fax transmission as the sale of tangible personal property. (See, e.g., Reg. 1502(f)(1)(D); BTLG Annot. 515.0010 (10/27/70).) Thus, under your facts, this charge is not taxable unless regarded as part of the sale price from taxable retail sales of tangible personal property. (Rev. & Tax. Code §§ 6011(b)(1), 6012(b)(1).) You are selling the CDs by leasing them in continuing sales. Assuming the leases are taxable (i.e., they do not qualify for the section 6362.7(b) exemption), your charges for the 1-900 service would be taxable if required as part of the lease of the CDs. We assume that your customers may lease the CDs without also obtaining the 1-900 service, and that they can obtain the 1-900 service without also leasing the CDs. Based on these assumptions, we conclude that your charges for the 1-900 service are not subject to sales or use tax.

If you have any further questions, please do not hesitate to write again.

Sincerely,

Victor G. Matl
Tax Counsel

VGM:cl

Enclosures: Regulations 1668, 1701

cc: --- District Administrator